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No. ———

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IN THE

Supreme Court of the United States

October Term, 1982

BASIC/FOUR CORPORATION,
Petitioner,

against

CENTRAL MICROFILM SERVICE CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Whether the Eighth Circuit's issuance of the extraordinary writ of mandamus directing the District Court to vacate its order for a new trial and to enter judgment for respondent is proper, particularly in view of this Court's holding in *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980), that the ordering of a new trial will "rarely, if ever, . . . justify the issuance of a writ of mandamus."

2. Whether the failure of the Eighth Circuit to follow squarely applicable decisions of this Court and of other federal Courts of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and the summary reversal of the Eighth Circuit's decision.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Basic/Four Corporation ("B/4") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on September 24, 1982.

Opinions Below

The opinion of the Court of Appeals (1a-31a)[1] granting the petition for mandamus of Central Microfilm Service Corp. ("CMS") and directing the District Court to enter

1. Citations bearing the suffix "a" refer to the pages of the Appendix to this Petition; citations bearing the prefix "C.R." refer to pages of the Clerk's Record, filed in the United States Court of Appeals for the Eighth Circuit, which will be filed as part of the certified record of this Court should this Petition be granted.

a judgment in the full amount of the jury verdict is reported at 688 F.2d 1206 (8th Cir. 1982). The opinion of the United States District Court (33a-56a) denying B/4's post-trial motion to set aside the verdict as to one claim (breach of contract), and granting B/4 a new trial as to the other claim (fraud) unless CMS accepted a reduced verdict on that count, is not officially reported.

Jurisdiction

This Petition for a writ of certiorari is filed within 90 days after the denial by the Court of Appeals (32a) on October 26, 1982 of B/4's timely petition for rehearing, and suggestion for rehearing in banc, of the initial judgment of the Court of Appeals which had been entered on September 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Sections 1291, 1292 and 1651(a) of Title 28, United States Code, which are involved, are set out verbatim in the Appendix hereto (57a-58a).

Statement of the Case

This litigation arises out of B/4's termination of its dealership agreement with CMS.[2] CMS, the former B/4 exclusive dealer for the St. Louis area, sued B/4 for wrongful termination, alleging breach of contract and fraud (C.R.

2. CMS had entered into a dealership contract with B/4, then a wholly-owned subsidiary of Management Assistance Inc. ("MAI"). In October 1980, B/4 was merged into, and became the Basic Four Information Systems Division of, MAI.

1-5). Federal jurisdiction was based on diversity (28 U.S.C. § 1332).

An initial trial verdict for CMS (C.R. 136-37) was set aside, and a new trial ordered (C.R. 144-46).

The retrial resulted in a substantially reduced jury verdict for CMS (C.R. 189-90). B/4's post-trial motion for judgment notwithstanding the verdict, or, in the alternative, a new trial, was denied as to the contract claim, but a new trial was granted as to the fraud claim unless CMS accepted a remittitur (33a-56a). CMS did not accept the remittitur, and the new trial order became effective. CMS subsequently purported to appeal from, *inter alia*, that order (C.R. 226); B/4 moved to dismiss the appeal and, to preserve its rights, cross-appealed (C.R. 227). CMS then also sought a writ of mandamus to review that order.

The Court of Appeals for the Eighth Circuit, in a decision dated September 24, 1982, (a) dismissed the appeal and cross-appeal for lack of jurisdiction; (b) concluded that the new trial order following the first trial had been proper; (c) concluded that the remittitur/new trial order, following the second trial, had been improper; and (d) granted CMS' petition for a writ of mandamus and directed the District Court to reinstate the second jury verdict (1a-31a).

In this Petition, B/4 seeks reversal of the Eighth Circuit's use of a writ of mandamus to review the District Court's new trial order.

Reasons for Granting the Writ

The Court of Appeals erroneously held that mandamus is an appropriate remedy for an alleged error in the granting of a new trial. This holding conflicts with applicable decisions of this Court as well as with the decisions of other federal Courts of Appeals. Moreover, this decision so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I

The Eighth Circuit's Issuance Of A Writ Of Mandamus Was So Clearly Improper As To Require Summary Reversal.

In *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980), this Court in a *per curiam* opinion swiftly and soundly rejected the use of a writ of mandamus to overturn a District Court's new trial order. So erroneous was the use of the writ that this Court decided the matter without the filing of briefs or oral argument.

The circumstances of *Allied Chemical* are, in all relevant respects, indistinguishable from those in the case at bar. In both cases the District Court ordered a new trial after a determination that the evidence did not support the jury's damage award. In both cases the District Court had available to it a means to reject the damage award without

ordering a new trial, but declined to use that procedure.[3] In *Allied Chemical*, this Court summarily reversed the issuance of mandamus; the same result is required here.

This Court in *Allied Chemical* emphasized that its definitive disposition of the issue was required because "[o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy" of mandamus (449 U.S. at 35), explaining that this "chary authorization of mandamus" was necessary to avoid "piecemeal appellate litigation" (*ibid.*). Thus, this Court continued—consistent with the Congressional injunction since adoption of the Judiciary Act of 1789 that appellate review should occur only after a final judgment has been entered by the trial court (see 28 U.S.C. § 1291)—mandamus may not be issued unless the party seeking issuance of the writ has "no other adequate means to attain the relief he desires" (449 U.S. at 35; citation omitted).

Applying these principles to a new trial order, this Court in *Allied Chemical* stated:

> "A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of madamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant

3. In *Allied Chemical*, the party which had been granted mandamus sought to avoid a complete new trial by having the judgment as to liability reinstated; here, similarly, CMS asked for reinstatement of the verdict or entry of a reduced judgment (Petition For Writ Of Mandamus, p. 19).

'has no other adequate means to seek the relief he desires.' " *Id.* at 36.

See also *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943), in which this Court reversed the Court of Appeals' grant of a writ of mandamus, holding it improper because the District Court's decision—even if erroneous and even if it imposed an unnecessary "costly and inconvenient" trial of "several months' duration" (*id.* at 30)—was within the District Court's discretionary authority.

Thus, as was the case in *Allied Chemical* and in *Roche*, "[i]n issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and policy of Congress" (319 U.S. at 32).

All Courts of Appeals applying *Allied Chemical*, and most of those faced with the issue prior to its decision, have recognized that use of mandamus to review a new trial order is improper. See, *e.g.*, *United States* v. *Sam Goody, Inc.*, 675 F.2d 17, 25-27 (2d Cir. 1982) (mandamus to be granted only in "extraordinary circumstances," "not . . . merely because it is the only way in which the district court's new-trial order might be reviewed"); *United States* v. *Winner*, 666 F.2d 447, 449-50 (10th Cir. 1981) (same); *Delano* v. *Kitch*, 663 F.2d 990, 1001-02 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2012 (1982) (mandamus improper to review new trial order following second trial); *Pat Ryan & Associates, Inc.* v. *Dupree*, 474 F.2d 1342 (4th Cir. 1973) (opinion unpublished) (mandamus improper to review order of new trial based on finding that jury awarded excessive damages); *Thorn* v. *Parkland Chevrolet Co.*, 416 F.2d 95 (4th Cir. 1969) (final judgment rule cannot be

avoided by use of mandamus); *Bigart* v. *Goodyear Tire & Rubber Co.*, 361 F.2d 317, 318-19 (2d Cir. 1966) (mandamus not appropriate to review new trial order); *Gottlieb* v. *Rubenstein*, 252 F.2d 779 (6th Cir. 1958) (mandamus "not to be used as a substitute for an appeal" of a remittitur/new trial order).

In issuing the writ of mandamus, the Eighth Circuit thus made an important and radical departure from settled federal law. Its ruling conflicts with decisions of this Court and of Courts of Appeals for other circuits. Therefore, this Petition for certiorari should be granted.

II

The Court Below Erred In Ignoring The Mandate Of *Allied Chemical*.

It is axiomatic that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.* v. *Daiflon, Inc., supra*, 449 U.S. at 34. See also *Will* v. *United States*, 389 U.S. 90, 104 (1967) ("Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' [Citation omitted] Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power"). Yet, the Court of Appeals below, in conflict with this Court's decisions, granted this extraordinary remedy to overturn the District Court's singularly unexceptional new trial order.

Recognizing, as it was compelled to, the controlling precedent of *Allied Chemical*, the Court of Appeals below

nevertheless concluded that mandamus was appropriate (8a-10a): (a) because the evidentiary issue upon which the new trial order was based was purportedly not a question committed to the District Court's discretion; (b) because the new trial order in question followed a second trial; and (c) because the district courts need guidance as to how to rule on a post-trial motion upon determining that a verdict is excessive by a sum certain.

None of these factors warranted the Eighth Circuit's deviation from the clear rule enunciated by this Court.

A. The District Court's New Trial Order Was Within Its Discretion.

The Eighth Circuit was in error when it held that the issue on which the District Court based its new trial order was not one "traditionally deemed a matter of trial court discretion" (8a). The District Court ordered a new trial because of the inclusion in the jury award of damages that were not supported by the evidence.[4] This is precisely the

4. The Court of Appeals omitted from its recitation of the District Court's decision the following italicized language:

> "With respect to software service costs the Court finds that the jury unjustly compensated plaintiff in Count V [fraud]. Credible evidence showed that from January 7, 1977, through March 31, 1979, plaintiff had sales of $170,322.00 against expenses of $210,909.00 for a loss of $40,587.00. *See* Ex. 66C-2. *The credible evidence showed further that in spite of a competitive software services market and a crying need to bolster sales plaintiff invested substantial time and effort in software services.* This was required neither by the [dealership] Agreement nor at the request of defendant. Accordingly, the Court finds that the jury award in Count V improperly included $40,587.00 in losses for computer software services" (52a; emphasis added).

The italicized sentence constitutes a finding of fact upon which the District Court relied in reaching its decision. Only the District Court, by virtue of its conduct of the trial, was in a position to reach this conclusion.

type of finding traditionally left to the District Court's discretion. See, *e.g., United States* v. *Johnson,* 327 U.S. 106, 111 (1945) ("[I]t is not the province of . . . the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact").

More important, of course, is the fact that, even if the District Court acted beyond its discretion, its conduct hardly constituted "exceptional circumstances, amounting to a judicial usurpation of power," as is required for mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc., supra,* 449 U.S. at 35. Rather, CMS made, at most, nothing more than a "simple showing of error," which this Court has explicitly held not properly reviewable by mandamus. *Ibid.* Allowance of the use of mandamus in this situation would encourage the frequent characterization, by disgruntled litigants, of new trial orders as "judicial usurpations of power." The inevitable effect of such a trend would be a weakening of the Final Judgment Rule and a denial of the sound rationale on which it is based.

B. It Is Irrelevant That The District Court's Order Followed A Second Trial.

That the District Court's new trial order in effect ordered a third trial is irrelevant. Because the new trial order following the first trial was warranted, as the Court of Appeals explicitly held (10a-11a), the posture of this case at this point is equivalent to that of any other case—including *Allied Chemical*—in which a new trial order follows a jury verdict.

The exception sought to be created by the Court of Appeals below conflicts with the decisions of other federal Courts of Appeals. These courts have rejected the propriety of mandamus to permit immediate review of a new trial order following a second trial. See, *e.g.*, *Delano* v. *Kitch*, *supra*, 663 F.2d at 1001-02 (mandamus improper to review new trial order after second trial); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981) (proper for district court to set aside second trial verdict, after first trial verdict had been set aside, and order third trial); *General Motors Corp.* v. *Perry*, 303 F.2d 544, 545 (7th Cir. 1962) (mandamus denied to vacate new trial order following second trial); *General American Life Ins. Co.* v. *Central Nat. Bank of Cleveland*, 136 F.2d 821 (6th Cir. 1943) (district court improperly declined to consider on merits motion for new trial after third trial).

The Eighth Circuit's use of mandamus here simply reflects its dissatisfaction with Congress' decision, in the Final Judgment Rule, to preclude appealability of new trial orders. But any change of that rule must be made by Congress, not by the Courts. It is within the exclusive province of Congress to legislate an exception to the Final Judgment Rule providing for appeals from new trial orders following second trials.[5] Its failure so to act must be binding on the Court of Appeals below.

5. Indeed, Congress did provide, in 28 U.S.C. § 1292, for interlocutory appeals in certain circumstances. This case does not fall within the allowable interlocutory appeals set forth in § 1292(a); significantly, CMS did not attempt to avail itself of the mechanism set forth in § 1292(b) for certifying other interlocutory appeals.

C. There Was No Need For District Court Guidance So As To Justify The Use Of Mandamus.

The Court of Appeals also based its decision in part on the district courts' purported need for guidance as to whether a new trial, rather than a reduced judgment, should be ordered when the only flaw in a jury verdict is its excessiveness due to the jury's inclusion of an amount certain (10a).

The practice of ordering a new trial unless the plaintiff agrees to a remittitur of excessive damages is well-established, and within a district court's discretion. 11 Wright & Miller, *Federal Practice and Procedure*, § 2815, at 100 (1973); 6A Moore's *Federal Practice* ¶ 59.08[7] (2d ed. 1982); *Holmes* v. *Wack*, 464 F.2d 86, 89 (10th Cir. 1972); *Cosentino* v. *Royal Netherlands Steamship Co.*, 389 F.2d 726 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968); *Dorin* v. *Equitable Life Assurance Society of the United States*, 382 F.2d 73, 77-78 (7th Cir. 1967); *Mooney* v. *Henderson Portion Pack Co.*, 339 F.2d 64 (6th Cir. 1964); *Gottlieb* v. *Rubenstein*, *supra*, 252 F.2d at 779-80.

Underlying the Eighth Circuit's questioning of this practice may be its desire to expedite respondent's right to appeal, which is postponed by the remittitur/new trial option. But this deferment is required by the Final Judgment Rule, which Congress has not seen fit to amend to provide for appealability under such circumstances.[6] A

6. Indeed, in *General Motors Corp.* v. *Lord*, 488 F.2d 1096, 1101 (8th Cir. 1973) (Bright, J. concurring), one judge of a different panel of the Court of Appeals below, recognizing that mandamus did not lie to obtain an immediate review of a new trial order, expressly asked for such amendment.

Court of Appeals may not emasculate that rule merely because one party to a lawsuit desires an immediate review rather than a new trial. As this Court stated in *Roche* v. *Evaporated Milk Association, supra,* 319 U.S. at 30, the "inconvenience [of a long, costly trial which could be avoided by immediate appellate review] is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."[7]

Further, had the drafters of the Federal Rules deemed it appropriate to require a district court, upon finding a verdict excessive by a sum certain, to enter judgment for the reduced amount, they would have mandated such limited procedural option by appropriate amendment of the rules. The rules, however, do not prohibit the use of a remittitur option. The Court of Appeals below improperly assumed the power to effect such amendment.

Thus, the propriety of the form of order selected by the District Court is clear, and no further guidelines are needed. The decision of the Eighth Circuit in overriding that order by use of the extraordinary writ of mandamus therefore unduly departs from the accepted and usual course of judicial proceedings.

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7. Significantly, as the Eighth Circuit's opinion acknowledges, the vacating of its writ of mandamus and the consequent reinstatement of the District Court's new trial order could well have a meaningful effect on the outcome of this case. The Court of Appeals below at several points in its opinion recognized that the evidence would have sustained a verdict for either party (*e.g.,* 16a, 20a). Moreover, at one point (25a), the Court of Appeals below noted that a certain jury instruction requested by B/4 should have been given, if it had been requested in what that Court stated to be proper form.

Conclusion

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Dated: December 6, 1982

Respectfully submitted,

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